

Washington University Global Studies Law Review

Volume 8

Issue 2 *Law in Japan: A Celebration of the Works of John Owen Haley*

January 2009

Antitrust by Other Means: Haley on Form and Function

Salil K. Mehra

Temple University

Follow this and additional works at: https://openscholarship.wustl.edu/law_globalstudies



Part of the [Antitrust and Trade Regulation Commons](#), and the [Comparative and Foreign Law Commons](#)

Recommended Citation

Salil K. Mehra, *Antitrust by Other Means: Haley on Form and Function*, 8 WASH. U. GLOBAL STUD. L. REV. 333 (2009),
https://openscholarship.wustl.edu/law_globalstudies/vol8/iss2/11

This Article & Essay is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Global Studies Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

ANTITRUST BY OTHER MEANS: HALEY ON FORM AND FUNCTION

SALIL K. MEHRA*

I. INTRODUCTION

To celebrate Professor John Haley's work would mean for most to consider his place in the study of Japanese law, an important place indeed. But the focus of this Essay is slightly different. Instead, it seeks to avoid giving Haley's place in antitrust short shrift in this *Festschrift*. In particular, Haley approached comparative antitrust law before it was actually a field. In doing so, he pioneered a way of thinking about both the form and function of enforcement that is relevant to the design of competition law regimes today.

To understand how Haley's work remains relevant, it is worth noting three important aspects of what his research did. First, he managed to articulate a conception of comparative antitrust law during a time when antitrust was often cast as a largely American show. Second, he demonstrated the importance of institutions and legal infrastructure to antitrust law, and how antitrust might function with remedies other than our own. Finally, he explicated the role of politics and political theory in providing a basis for antitrust within a society.

II. COMPARATIVE ANTITRUST IN AN ANTITRUST-SCARCE WORLD

Today, it is easy to think of competition law as subject to a near-global consensus. Since the early 1990s, the world has seen the establishment of antitrust regimes in the Eastern European transition economies,¹ Latin America,² China,³ and India.⁴ Additionally, during this period the

* Professor of Law, Temple University, Beasley School of Law, smehra@temple.edu; 2008 Chair, Section on Antitrust and Economic Regulation, Association of American Law Schools. This brief Essay was presented at *Law in Japan: A Celebration of the Works of John Owen Haley*, a conference in honor of Prof. John Haley at Washington University School of Law, May 2008. Thanks to attendees for their comments, and thanks to Sarah Beth Mehra for her editing skills and loving support. All errors and omissions are those of the author.

1. See Tibor Varady, *The Emergence of Competition Law in (Former) Socialist Countries*, 47 AM. J. COMP. L. 229, 244-48 (1999).

2. See D. DANIEL SOKOL, *LATIN AMERICAN ANTITRUST DEVELOPMENTS* (forthcoming 2009).

3. H. Stephen Harris, Jr. & Rodney J. Ganske, *The Monopolization and IP Abuse Provisions of China's Anti-monopoly Law: Concerns and a Proposal*, 75 ANTITRUST L.J. 213, 213 (2008).

4. See Eleanor Fox, *India: The Long Road to a Full-Function Competition Law*, ANTITRUST,

European Union has established a particularly vigorous transnational competition law enforcement arm.⁵ Japan, too, has taken steps to reinvigorate the often quiet Japanese Fair Trade Commission (“JFTC”).⁶ Beyond these steps at the national level, there have also been recent moves, the results of which are yet unclear, to harmonize existing competition law via a number of international organizations, including the Organization for Economic Coordination and Development, the International Competition Network, and the World Trade Organization.⁷ The changes at both the national and international levels represent a growing consensus on the benefits of competition law harmonization and the harms of certain practices, most notably hard-core cartels. Additionally, competition law has become trendy in the sense that nations have come to accept that having their own antitrust law is a hallmark of being a player in the world trading system.

And yet it was not always so. Indeed, quite recently, even nations that were indisputably major players in the world trading system did so with meager portions of antitrust on their development menus. As Haley pointed out in an in-depth study, a “perceived failure of enforcement was a major theme in discussion of antitrust policy in both the Federal Republic of Germany and Japan” during the 1970s.⁸ As a result, it was common to conceive of antitrust law as a largely American creation; one of the most important academic lines of inquiry at the time was the degree to which the enforcement of U.S. antitrust law beyond American borders created

Spring 2007, at 72.

5. See RICHARD WHISH, *Overview of EC and UK Competition Law*, in COMPETITION LAW (5th ed. 2005) (describing increased activity in European Union competition law).

6. During the Koizumi era, several important changes potentially strengthened the JFTC. In 2003, it was moved from a location under the Ministry of Internal Affairs and Communication to a position that is organizationally under the Cabinet Office, thus more directly under the Prime Minister. In 2004, a large revision of the Antimonopoly Law led to a significant increase in the administrative surcharge levied on cartels from six to ten percent of cartel turnover. Additionally, in that year, the JFTC adopted a new set of merger review guidelines that harmonized and clarified its enforcement goals. Finally, throughout the Koizumi era, the JFTC engaged in an advocacy program aimed at fostering a so-called “competition culture” among the domestic business community. It is perhaps too early to tell whether these moves will have actual results.

7. See, e.g., KY P. EWING, COMPETITION RULES FOR THE 21ST CENTURY: PRINCIPLES FROM AMERICA’S EXPERIENCE 51–52 (2003) (reporting on efforts by the OECD, WTO, and ICN to harmonize competition laws and expressing optimism about the ICN due to its focus on “antitrust only; antitrust all the time”); Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT’L L. 113, 158 (2009) (describing efforts of OECD, UN, and WTO on international antitrust cooperation and singling out the ICN as having “created significant momentum” for cooperation).

8. John O. Haley, *Antitrust Sanctions and Remedies: A Comparative Study of German and Japanese Law*, 59 WASH. L. REV. 471, 471 (1984) [hereinafter Haley, *Antitrust Sanctions*].

improper tension with what were considered the legitimate interests of other nations *not* to enforce competition norms.⁹

In particular, Haley's was a study of how the Japanese and Germans were trying to recharge their seemingly toothless antitrust regimes. This emphasis is interesting more for its relevance to today's problems than to America's problems in the 1980s, when Haley began to write on this subject. After all, in the early 1980s, U.S. antitrust enforcement was often seen as having been *overly* active. As a result, during the 1970s and 1980s, the study of antitrust in American law schools focused on improving substantive rules about what conduct to punish.¹⁰ By contrast, Haley was trying to study how nations tried to move from little or no enforcement to higher levels. Given the new antitrust regimes established since the 1990s in transition and emerging economies, this is a problem that has arguably become substantially more relevant since Haley first approached the topic.

Haley's comparison of West German and Japanese antitrust regimes to each other and to the United States remains interesting in part for what it is not. Haley avoided a direct critique of differences in the substance of antitrust law.¹¹ His stated principle goals were the means and degree of enforcement.¹² The aim was not to illustrate specific different, better substantive antitrust rules that might be transplanted. Rather, his work formed an attempt to explain the larger mechanics behind how these formerly occupied nations metabolized the antitrust law that America had force-fed them.

For Haley, antitrust was a vehicle for studying comparative law. His focus was "enforcement itself, not the policy being enforced—that is, whether, irrespective of the policies being enforced, differences in the sanctions used, the processes involved, and the degree or level of enforcement attained are themselves consequential factors in either promoting or restricting trade."¹³ Thus, his work was not about, for example, other countries' differing treatment of resale price maintenance relative to the United States.¹⁴ In hindsight, this is somewhat remarkable

9. The leading treatise on the subject was quite influential in making this point. KINGMAN BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* (1958).

10. *See, e.g., infra* note 15.

11. Haley, *Antitrust Sanctions*, *supra* note 8, at 472.

12. *Id.*

13. *See* John O. Haley, *Competition and Trade Policy: Antitrust Enforcement: Do Differences Matter?*, 4 PAC. RIM L. & POL'Y J. 303, 305 (1995).

14. *See* Salil K. Mehra, *Copyright, Control and Comics: Japanese Battles over Downstream Limits on Content*, 56 RUTGERS L. REV. 181 (2003). In 2007, the U.S. Supreme Court overturned the ninety-year history of the *per se* rule against minimum resale price maintenance, raising the possibility that the United States might move toward the more lenient treatment seen in Japan and Germany;

given the contemporaneous focus in the United States on substantive antitrust law, particularly the implications of law and economics on the treatment of specific antitrust violations.¹⁵

In this regard, Haley's work remains relevant today. In particular, when he started to focus on Japanese and German antitrust, it was not accepted wisdom that developed nations needed to have an American-style antitrust regime. As a result, Haley proceeded from a quiet assumption that antitrust was a universal impulse, at least in developed nations.¹⁶ That said, he maintained agnosticism on the benefits of antitrust; as he put it, "[w]hether competition policies either inhibited or aided economic recovery and growth in either Japan or Germany remains contested."¹⁷ During the 1980s in particular, policymakers sometimes faulted American antitrust law as putting American industry at a disadvantage versus their advancing foreign competitors.¹⁸ Ironically, Haley's question of how nations with weak regimes invigorate themselves was perhaps not as timely then as it is now, as the adoption and reinvention of competition regimes has come in vogue.

III. FUNCTION AND FORM IN ENFORCEMENT

Haley's main focus was on how different nations design their antitrust enforcement and what that tells us about their legal system. To Haley, "[e]xamination of the sanctions and remedies of German and Japanese antitrust law . . . highlights features of the German and Japanese legal

however, it remains to be seen whether the United States would similarly authorize conduct as per se *legal*, which these nations have done for certain product categories. *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007).

15. *See, e.g.*, ROBERT BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 56 (1978) (describing tensions between antitrust's then concern with "small-producer welfare" with Robert Bork's preferred metric of "consumer welfare"); RICHARD POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 4 (1976) (stating that "efficiency . . . should be the only goal of antitrust law," and setting forth the "implications for [substantive antitrust] law of adopting this view of its purpose").

16. In his later work on comparative antitrust, Haley makes explicit the assumption that antitrust likely follows industrialization. John Haley, *Competition Policy for East Asia*, 3 WASH. U. GLOBAL STUD. L. REV. 277, 283 (2004) (stating that "the perceived evils of monopoly power and restraints of competition have been viewed largely as the ills of advanced industrial states" and that it is "difficult to single out a case in which the effective implementation of competition legislation preceded economic development").

17. *Id.*

18. Indeed, the Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. § 6a (2006), recently addressed by the Supreme Court in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), was passed as part of an attempt to lessen this "burden" on American business as it competed in foreign markets against other nations' multinationals, including those of Japan and Germany.

systems that are often obscured by a focus on substantive law”¹⁹ Thus, he took antitrust to be a kind of common impulse that would work its way through a developed nation’s legal system. In a sense, Haley started with an unstated assumption that the antitrust regimes of Germany and Japan must express themselves in some way. Even if they were viewed as relatively passive compared to the United States, the ways in which they tried to act, even if frustrated, would be telling. Simply put, the choice of tool would indicate what tools could be used.

In particular, remedies became crucial to this test of legal systems. For Haley, the hallmark of these systems was a lack of power to address violators. He recognized that “the Federal Republic [of Germany] and Japan share a common weakness in antitrust enforcement—the lack of effective legal sanctions”²⁰ That is, given wrongdoing, the fact that judges and regulators were relatively powerless in Germany and Japan when compared to the United States seemed to show a general lack of legal enforcement power in those societies.

Most prominently, the lack of judicial contempt power in Germany and Japan, according to Haley, undermined effective antitrust, at least as pursued through courts.²¹ This was particularly central to Japanese regulators, because, as Haley points out, German regulators had greater access in reality to criminal prosecution for antitrust violations than did their Japanese counterparts.²² Under this account, because neither judicial nor administrative orders could be enforced with contempt power in Japan, judges and bureaucrats were less likely to use such orders to deal with antitrust violators. Though the contention that Japanese courts did not have the power to enforce their orders is not uncontested,²³ the relative

19. Haley, *Antitrust Sanctions*, *supra* note 8, at 472.

20. *Id.* at 474.

21. *Id.* at 474–75.

22. *Id.* at 475–81. Even the few Japanese cases leading to criminal prosecutions have led only to suspended criminal sentences, including the famous 1970s oil cartel cases. See JOHN O. HALEY, *ANTITRUST IN GERMANY AND JAPAN: THE FIRST FIFTY YEARS 1947–1998*, at 146–66 (2001) [hereinafter HALEY, *ANTITRUST IN GERMANY AND JAPAN*]. Decades later, in 2004, ten oil companies were convicted of rigging bids to supply the Japan Defense Agency; the Tokyo High Court sentenced nine company officials to terms ranging from six to eighteen months in prison—all of which were suspended. *Id.* at 163–64. See *Oil Firms Fined for Rigging Bids*, *JAPAN TIMES*, Mar. 25, 2004, at A9, available at <http://search.japantimes.co.jp/cgi-bin/nn20040325a9.html>.

23. Compare HALEY, *ANTITRUST IN GERMANY AND JAPAN*, *supra* note 22, at 143 (portraying Japanese courts as lacking sufficient enforcement power because, for them, “[a]ll remedies and sanctions must have specific statutory basis” and thus cannot be based in inherent judicial power) with J. MARK RAMSEYER & MINORU NAKAZATO, *JAPANESE LAW: AN ECONOMIC APPROACH* 147–50 (1998) (describing Japanese courts’ powers to fine or imprison stubborn parties and recalcitrant witnesses).

infrequency of administrative and judicial orders to enforce competition policy is quite striking in contrast to the U.S. enforcement agencies and the European Commission. For Haley, the failure of antitrust enforcement in this regard demonstrated a larger systemic weakness within the legal system as a whole.

Similarly, the study of Japan and Germany highlighted the more centralized, public nature of enforcement. Perhaps nothing exemplifies this more than the rarity in these nations of the private damage action. Of course, it is perhaps difficult for someone coming from the American system to avoid a problem of perspective. The availability of treble damages in the United States, in contrast to Europe or Japan, tends to attract many more private plaintiffs.²⁴ Thus, for the American observer, it is easy to take the United States—perhaps unwisely—as a baseline and marvel at the relative lack of private enforcement elsewhere.

Haley avoided this perspective in part due to his wise choice of both Germany and Japan for comparison. Neither antitrust regime featured—or yet features—treble damages for private antitrust litigants.²⁵ During the period studied, both yielded very low levels of private damage actions.²⁶ But private damage actions in these nations were not entirely absent, either.²⁷

By choosing systems in which private actions were similarly rare, it was possible to examine the relative constraints on these actions. The recipe for a winning private lawsuit requires a variety of ingredients, from available counsel and useful information, to damage awards that make the lawsuit worth the effort. Private litigation may fail to proceed for different reasons. According to Haley, in Germany, institutional barriers to private litigation were few; compared to Japan, Germany had relatively ample lawyers and judges and quick dockets.²⁸ But the relevant German statutes greatly narrowed the class of individuals who could bring a private antitrust action.²⁹

24. See Douglas H. Ginsburg, *Comparing Antitrust Enforcement in the United States and Europe*, 1 J. COMPETITION L. & ECON. 427, 435–37 (2005) (discussing the influence of treble damage provisions in increasing the number of private antitrust cases being filed in the United States by several orders of magnitude).

25. See Hannah L. Buxbaum, *Jurisdictional Conflict in Global Antitrust Enforcement*, 16 LOY. CONSUMER L. REV. 365, 372–73 (2004) (noting that private treble damages are a uniquely American remedy and that most other regimes oppose the availability of multiple damages awards altogether).

26. HALEY, ANTITRUST IN GERMANY AND JAPAN, *supra* note 22, at 150 (Germany), 155 (Japan).

27. *Id.* at 150 (Germany), 155 (Japan).

28. *Id.* at 151.

29. *Id.* at 150–57.

By contrast, Japan had a relatively favorable statutory authority for private damages.³⁰ However, what were not constraints in Germany for private plaintiffs *were* constraints in Japan. At an overarching level, Japan had relatively few judges and lawyers available to deal with private antitrust cases.³¹ Thus, the institutional barriers were significant. More specifically, Japanese judges imposed fairly strict causation requirements on private plaintiffs.³² As a result of these limitations, what looked favorable on paper was not as favorable in practice.

These observations concerning private damage remedies continue to be quite relevant today. While the United States considers the extent to which its private damage remedies go too far, the European Union has been considering how to encourage and incorporate more private litigation into its competition law.³³ Understanding the pathology of failed private enforcement can be crucial in designing more effective private actions. Additionally, some factors encouraging private litigation may be more amenable to quick change than others—for example, damage multipliers compared to discovery regimes. Thus, a study of what can stall private antitrust litigation is useful for understanding what deficits merely discourage, as opposed to absolutely inhibit.

What may be Haley's most interesting suggestion in his comparative antitrust studies may also be his most relevant yet. Given the failure of private litigation and the lack of injunctive orders, Haley points to reputational sanctions as the chief weapon of German and Japanese antitrust enforcers. Although they have had other cudgels, such as monetary fines, Haley points out that these were historically quite minimal—with maximum fines in the early 1980s of forty thousand dollars for hard-core cartel behavior in Germany, and twenty thousand dollars in Japan.³⁴

The real impact of the fines, however, was to drive newspaper coverage of violations and attach adverse publicity to the violators. And, in Haley's words, “[i]n both Germany and Japan publicity of violations

30. *Id.* at 154.

31. *Id.* at 156.

32. *Id.* at 154.

33. See, e.g., Commission of the European Communities, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2008) 165 final (Apr. 2, 2008), available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf; Denis Waelbroeck, Donald Slater & Gil Even-Shoshan, Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules (Aug. 31, 2004), available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf.

34. Haley, *Antitrust Sanctions*, *supra* note 8, at 481–83.

appears to be the most significant sanction imposed on offenders, and the most effective deterrent.”³⁵ This kind of publicity harms the reputation of the offending corporation and may spur other government officials to act. Additionally, as Haley points out, in Japan the JFTC has the ability to quietly carry out enforcement by using the threat of adverse publicity to generate compliance.³⁶

The power of shame and reputation to shape behavior has become more widely accepted since Haley wrote in 1984 about the use of such sanctions by German and Japanese antitrust enforcers. Often, but not always, these kinds of sanctions are presented as alternatives to traditional regulation or perhaps as tools of private self-governance.³⁷ There is little literature discussing the use of adverse publicity by government officials as a tool of economic regulation. Perhaps this is because, as Haley identified, there may be serious due process problems with adverse publicity as a government sanction; it is difficult to imagine how effective judicial review of such a punishment could take place.³⁸ These fundamental problems may seem to swamp an analysis of the cost and benefits of such sanctions.

That said, in societies where issues of due process and judicial review may not be as critical, the adverse publicity sanction that Haley identified may be quite relevant today. Indeed, the recent work of Curtis Milhaupt and Ben Liebman echoes this point in its description of Chinese authorities using public criticism to punish securities wrongdoers.³⁹ Similarly, one positive view of China’s recently enacted Antimonopoly Law is that even a relatively toothless new antitrust enforcement agency might still possess the power to collect and disseminate information about the perceived harms of antitrust violations, which, in turn, could stir up demand for more enforcement.⁴⁰

35. *Id.* at 505–08; HALEY, ANTITRUST IN GERMANY AND JAPAN, *supra* note 22, at 168.

36. HALEY, ANTITRUST IN GERMANY AND JAPAN, *supra* note 22, at 169.

37. *See id.* at 168.

38. *Id.* at 170.

39. *See Economic Focus: In the Stocks*, ECONOMIST, Mar. 1, 2008, at 82 (discussing the work of Liebman and Milhaupt).

40. *See* Eleanor M. Fox, *An Anti-Monopoly Law for China—Scaling the Walls of Government Restraints*, 75 ANTITRUST L. J. 173, 177 (2008) (“[T]he anti-monopoly authorities have the chance to play a strong surveillance role, perhaps to use advocacy powers to catalogue and publish the (surely) thousands of illegal market-blocking restraints they may observe, to make proposals for remedies with teeth to the disciplining authority, and to tally up, publicly, the costs of the offenses to China.”).

IV. THE SOCIAL AND POLITICAL CONTEXT OF COMPETITION LAW

A third way in which Haley's work on comparative antitrust law remains relevant is his focus on the ideological basis and political context within which antitrust regimes operate. In particular, his comparison of Germany and Japan is interesting with regard to what he describes as the similar origins of their antitrust laws and similar low levels of enforcement, but quite different surrounding dynamics.

Both nations inherited their antitrust laws from the postwar period of occupation.⁴¹ But for Haley, one of the key differences between these nations is the contrast between the development of a strong postwar ideological commitment to a liberal economic order in Germany with the entrenchment of a weaker commitment in Japan.⁴² His account is one of a strong German commitment to competition free of public and private restraints in the early postwar era, in contrast to the relative Japanese friendliness to Marxist and mercantilist policies.⁴³

It is hard to be sure how much weight to place on such observations. Ideological commitments are not easily measured, and they can be confounded by external factors. By 1957, Germany had joined the Treaty of Rome, beginning the process of delegating competition policy to a transnational body.⁴⁴ Thus, the differences in competition ideology between Germany and Japan may have become less important than Germany's incorporation into a wider community with its own ideological commitments. Strikingly, whatever their ideological leanings, Germany and Japan were able to accomplish their respective postwar economic miracles.

Even so, the conception of ideological commitment and political context remains highly important to thinking about the future of antitrust. And not just for the design of new or reinvigorated antitrust regimes. As Haley pointed out,

Antitrust policy does not create the conditions for new entry. Directed at the private sector, it deals with barriers created by dominant enterprises or through private collective action. The more serious barriers are those imposed by law and regulation. Far more

41. HALEY, ANTITRUST IN GERMANY AND JAPAN, *supra* note 22, at 43–45 (Germany), 52–53 (Japan).

42. *Id.* at 45, 52.

43. HALEY, ANTITRUST IN GERMANY AND JAPAN, *supra* note 22, at 43–44, 52.

44. *Id.* at 50.

significant than antitrust controls is the commitment of governments to the vision on which they are founded.⁴⁵

Government action as a critical element in creating sustainable monopolies or cartels is a calling card of Chicago School antitrust.⁴⁶ But as deployed by Haley, this concept is somewhat more susceptible to an optimistic interpretation. Instead, the subtext is that government can improve its own regulation by absorbing a culture of and making a commitment to competition. Thus, it is not enough to create a system that reacts to anticompetitive conduct. Ideally, and perhaps in defiance of the idea that regulatory capture operates as universally as gravity, there must also be a government commitment to the creation of an environment where competition can take place through entry and innovation.

This conception of where antitrust currently stands, and where it may yet need to go, is an unresolved tension at the intersection of American antitrust and intellectual property law. It is at the heart of concerns over Microsoft's power and doubts about the *Microsoft* case.⁴⁷ In one of the most noteworthy of a significant number of recent U.S. Supreme Court antitrust cases, *Verizon v. Trinko*, we see an echo of this problem in Justice Scalia's opinion. As he wrote, "The Sherman Act is indeed the 'Magna Carta of free enterprise,' but it does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition."⁴⁸ Rather, Scalia pointed to this task of actively reforming a monopolist as one more appropriate for an administrative agency with a commitment to effecting competition and better institutional competence for day-to-day supervision.⁴⁹

Thus, in Germany, Japan, the United States, and elsewhere, the problem of how to instill a government commitment to competitive markets continues to challenge us today. It would be a missed opportunity

45. *Id.* at 175.

46. *See, e.g.*, George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

47. *See, e.g.*, Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to High Technology Competition*, 44 WM. & MARY L. REV. 65, 68 (2002) (observing that "[t]here is currently considerable debate about whether aggressive antitrust enforcement helps or hinders the development of high technology"); Herbert Hovenkamp, *Restraints on Innovation*, 29 CARDOZO L. REV. 247, 251–52, 254–55 (2007) (discussing allegations by the Department of Justice that Microsoft "engaged in suppressing the innovations of others," including Sun's "Java virtual machine," and the shifts required for antitrust to be able to address this kind of conduct).

48. *Verizon Commc'ns Inc. v. Law Offices of Trinko*, 540 U.S. 398, 415–16 (2004) (citation omitted).

49. *Id.*

to stop short at the traditional conception of antitrust as a purely reactive instrument aimed at concrete private anticompetitive conduct.

V. CONCLUSION

To look at only one aspect of a career spanning several areas may not do justice to other linkages in Haley's work. However, John Haley's work on comparative antitrust law presents an interesting view of a significant area of law from an unusual angle. Rather than looking at how a single nation's antitrust regime relates to its own ideology or politics, or looking at antitrust violations and enforcement abstracted from context, Haley managed to compare and contrast antitrust regimes in tandem with their ideological, political, and legal contexts. Doing so helps us see the ways in which antitrust can succeed or fail based on the infrastructure, both institutional and ideological, that it needs.

It also helps us see the limits of traditional antitrust law in achieving its own goals. To the extent that Germany and Japan succeeded economically and fostered intense competition, both domestically and with their foreign competitors, it is easy to see that antitrust law in the form we conceive it—as regulatory agencies and lawsuits—may not be the be-all-and-end-all of nurturing market competition.

In a sense, one lesson to draw from these studies is a kind of tolerance of new antitrust regimes that may at first look slightly undercapitalized, or even ill-conceived. Certainly, no one would want to excuse incompetent institutional design. However, particularly when looking at new antitrust regimes, it may be worthwhile to consider whether they were designed less to reflect a desire to drive increased competition through courts and law. Instead, the goal of increasing a society's awareness and commitment to the benefits of increased competition should not be discounted.